NO. 83-1078

IN THE

Supreme Court of the United States

October Term, 1983

JEFFBOAT, INC.

Petitioner

versus

PAUL ROBERTSON, ADMR., etc.

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner submits that its application for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit presents the following questions for review:

1. Whether the decision of the Court of Appeals violates the "equal treatment" rationale of the United States Supreme Court's opinion in *Jones & Laughlin Steel Corp, v. Pfeifer*, 462 U.S. _____, 103 S.Ct. 2541 (1983).

2. Whether the decision of the Court of Appeals effectively eliminates the exclusive remedy provisions for a maritime employer in §5 of the United States Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905, by holding a shipbuilder liable in tort for a simple failure to provide a safe working environment for its employees.

3. Whether knowledge of employees engaged in vessel construction is properly imputed to their employer so as to impose on that employer, in its alternative status as owner of the hull under construction, a duty to remedy hazards in the work place.

4. Whether a vessel owner-employer who per statutory mandate cannot be held liable in tort for the negligence of fellow servants can now be found negligent based upon a fellow servant's mere knowledge of the existence of an unsafe condition.

5. Whether the Sixth Circuit's holding that mere knowledge of any hazard in shipbuilding activity necessarily imposes a duty on the vessel owner to intervene in that activity to remedy the hazard, which is in conflict with decisions of the Fourth and Fifth Circuits, is a misapplication of *Scindia Steam Navigation Co. v. de los Santos*, 451 U.S. 156 (1981).

CERTIFICATE

Pursuant to Rule 28.1, Petitioner states that the parent company of Jeffboat, Incorporated, is American Commercial Lines, Inc. The following is a list of affiliated companies of Jeffboat, Incorporated:

Amcom, Inc.
American Commercial Barge Line Company
American Commercial Credit Corporation
American Commercial Leasing Company, Inc.
American Commercial Lines, Inc.
American Commercial Terminals, Inc.
Bauer Dredging Co., Inc.
Commercial Barge Line Company
Inland Terminals, Inc.
Inland Tugs Co.
Louisiana Dock Company, Inc.
Mac Towing, Inc.
Mineral Properties, Inc.
Waterway Communications System, Inc.

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DECISIONS BELOW

The opinion of the United States District Court for the Western District of Kentucky is not reported. The first decision of the United States Court of Appeals for the Sixth Circuit is reported under the title "Robertson v. Jeffboat, Inc." at 651 F.2d 434 (1981). The United States Supreme Court vacated the Sixth Circuit decision and remanded the action in *Jeffboat, Inc. v. Robertson*, _____ U.S. _____, 103 S.Ct. 3528 (1983). The United States Court of Appeals for the Sixth Circuit reinstated its judgment in *Robertson v. Jeffboat, Inc.*, No. 80-3136 (Oct. 25, 1983).

JURISDICTION

Petitioner seeks a Writ to the United States Court of Appeals for the Sixth Circuit to review its order, filed on October 25, 1983, following remand by the United States Supreme Court, which reinstated its decision and order filed on June 19, 1981. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

This Petition raises issues under the following provisions of the United States Longshoremen's and Harbor Workers' Compensation Act:

> Exclusiveness of liability
>
> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed

the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter. 33 U.S.C. §905.

STATEMENT OF THE CASE

Plaintiff-respondent in this admiralty action is the administrator of the estate of William H. Robertson, a former employee of Defendant-petitioner, Jeffboat, Inc. Robertson drowned after apparently falling into the Ohio River at approximately 10:30 p.m. on February 27, 1975. He had been working in a crew which was sandblasting a barge being built by his employer at its Jeffersonville, Indiana, facility. No one actually saw Robertson fall into the river. The testimony of his co-workers established that just before he disappeared Robertson had been on the barge participating in a sandblasting operation, straightening air lines along the deck of the barge. He was last seen near the upstream end of the barge, and a few moments later one of his fellow crewmembers realized that he had disappeared. A sandblasting hood which he had been wearing came to the surface at the end of the barge, but Robertson himself was never observed. His body was recovered several months later.

The barge on which the accident occurred was one of a series being built by petitioner Jeffboat pursuant to a contract with Louisiana Barge Company, Inc., of New Orleans, Louisiana. The terms of the contract called for payment of 25% of the construction price on execution of the contract and the balance on delivery of the barge. The particular barge from which Robertson disappeared was completed on March 6, 1975, seven days following the accident, and was delivered on March 13, 1975. The incomplete barge hull was personal property of Jeffboat at the time of the accident.[1] It was a standard, unmanned inland river cargo barge. In his original complaint, Plaintiff-respondent alleged that Robertson had

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1 It was never contemplated that Jeffboat would be the owner of the vessel after it was placed in commerce and navigation.

been a member of the crew of the barge on which he had been working, and sought recovery under the Jones Act, 46 U.S.C. §688, for negligence, and under general maritime law for unseaworthiness of the barge. He also sued Louisiana Barge Company, alleging that it owned the barge on which the accident occurred. The trial court granted Petitioner's motion for summary judgment on the Jones Act and general maritime law claims, but while the motion was pending, plaintiff amended his complaint to allege a claim against Jeffboat under §5(b) of the United States Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b). Plaintiff voluntarily dismissed his claim against Louisiana Barge Company. The district court retained jurisdiction of the remaining claim pursuant to 28 U.S.C. §1333.

The claim under the compensation act was tried to the court, sitting without a jury, and the court made Findings of Fact and reached Conclusions of Law on which judgment was entered in favor of plaintiff. The trial court found that Jeffboat had been negligent in failing to provide temporary lighting for the work area where the accident occurred and in failing to provide life rings or alarm devices in the vicinity. The testimony had established without dispute that temporary lighting was customarily provided by the shipyard as part of the services rendered to the vessel owner during construction or repair activity. There was no evidence to show that any such lights were kept aboard the barge, or that vessel owners customarily provided temporary lighting for use on an unmanned vessel. Damages were awarded by the district court to the plaintiff administrator for the benefit of the surviving parents of the deceased to compensate them for the loss of his society, *Sea Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed. 2d 9 (1974), which damages were mitigated 50% for negligence of the deceased in failing to wear a life jacket.

In *Jeffboat v. Robertson*, 651 F.2d 434 (6th Cir. 1981), the Sixth Circuit affirmed the district court's opinion by holding that any knowledge of a dangerous condition that Jeffboat may have had as ship builder-employer would be imputed to Jeffboat as a vessel owner and that this imputed knowledge would create an *ipso facto* duty for the vessel owner to intervene and remedy the condition. The United States Supreme Court vacated that decision and remanded to the Sixth Circuit for reconsideration in light of its opinion in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. _____, 103 S.Ct. 2541. Commenting that it was ". . . unable to find any conflict . . ." between its original opinion and *Pfeifer*, the Sixth Circuit reinstated its prior decision by an order dated October 25, 1983.

ARGUMENT

The United States Longshoremen's Harbor Workers' Compensation Act provides that the obligation to pay compensation benefits prescribed in the Act shall be the exclusive liability of the employer to its employee or his legal representative.[2] The decision of the Court of Appeals in this matter effectively eliminates the immunity from tort liability for a shipbuilder in those instances where injury occurs on a vessel under construction as a result of an unsafe working condition occurring in the construction process. The Court of Appeals reached that conclusion by a combination of two errors: First, by its failure to draw a distinction between the employer's capacities as builder of the vessel and as owner of the res under construction; and, second, by its startling generalization of a vessel owner's duty purportedly drawn from this Court's decision in *Scindia Steam Navigation Co. v. de los Santos*, 451 U.S. 156 (1981).

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2 33 U.S.C. §905(a).

The Circuit Court's failure to draw the proper distinction between the separate capacities of the employer is in substantial conflict with this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. _____, 103 Ct. 2541 (1983), as well as decisions of the Second, Fourth and Fifth Circuits. The Circuit's original opinion, reinstated by it after having been vacated by this Court, violates the express intent of Congress as recorded in the legislative history of the statutory provision at issue, and its definition of the duty owed by a vessel owner to construction workers aboard his vessel is at odds with the holding in *Scindia*. For those reasons, a writ of certiorari should be issued to the Sixth Circuit to review these issues.

The evidence at trial showed beyond dispute that the accident which resulted in Robertson's death was caused concurrently by his own negligence and by a failure of his employer to provide temporary lighting.[3] The night shift superintendent for the defendant Jeffboat testified that temporary lighting ordinarily was provided by the foreman of the working crew. That fact was confirmed as consistent with industry practice by expert witnesses. The Safety & Health Regulations for Shipbuilding promulgated by the Occupational Safety & Health Administration contain detailed requirements governing lighting, including temporary lighting, 29 C.F.R. §1916.52, and life rings, 29 C.F.R. §1916.84(c), as a part of the employer's duty to provide a safe place in which to work.

The evidence as to the practice of providing temporary

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3 The trial court also found that Jeffboat was negligent in failing to provide life rings and alarm devices, but Robertson was never seen after he disappeared from the barge, and such a failure could not have caused his death.

lighting where necessary at Jeffboat, the evidence of industry custom, and the applicable regulations compel the conclusion that the inadequate lighting which contributed to this casualty was a breach of duty by the employer as builder of the barge. There was no opposing evidence to show practice, custom, or regulation requiring a vessel owner under these circumstances to provide the necessary lighting; indeed, Plaintiff-respondent's expert witnesses specifically negated any such custom. Neither was there any evidence of knowledge of inadequate lighting at the work site on the part of Jeffboat's employees other than the members of the crew in which Robertson was working and the night shift superintendent.

This factual predicate raises the issue of interpretation and application of the provisions in the 1972 amendments to the United States Longshoremen's and Harbor Workers' Compensation Act which provide an exception to the employer's immunity from tort actions on behalf of its employees. Such actions had been allowed by decision of this court in *Reed v. S. S. YAKA*, 373 U.S. 410 (1963), and Congress added the following provision to the section governing employers' tort liability:

> If such person [an employee covered by the Act] was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel.

33 U.S.C. §905(b).

The legislative history[4] regarding that provision and the

4 H. R. Report No. 92-1441, 1972 U.S. Code Cong. & Admin, News 4698, 4705.

decisions of the Courts of Appeals interpreting it establish that a longshoreman, repairman, or shipbuilder retains the right to sue his employer in its capacity as owner of a vessel on which he works by treating the relationship between them as if he and his co-workers were employed by an independent contractor. The clear intent is to eliminate the inequity arising from literal application of the tort immunity provision where the employer also happens to own the vessel on which services are being rendered - - the inequity which prompted the decision in *Reed v. S. S. YAKA*.

This Court held fast to the "equal treatment" rationale in its recent decision of *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. _____, 103 S.Ct. 2541. The longshoremen claimant there was injured in the course of his employment by the defendant as a loading helper on the defendant's coal barge. Plaintiff received compensation payments from his employer, but also sued the employer for damages for vessel negligence. The district court entered judgment in favor of plaintiff awarding tort damages against the plaintiff's employer in its capacity as vessel owner, and that judgment was affirmed by the Third Circuit. On Writ of Certiorari to the Third Circuit, the defendant employer sought to persuade the Supreme Court that §5(a) of the United States Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(a), limited its liability to its employee to the compensation benefits provided in §4 of the Act. This court focused its inquiry on the conflicts between §5(a)'s exclusive remedy language and §5(b)'s granting of a cause of action for vessel negligence and stated:

> Although petitioner's contention [that compensation under §4 should be plaintiff's exclusive remedy under §5(a)] is, indeed, supported by the plain language of §5(a), it is undermined by the plain language of

> § 5(b). The first sentence of § 5(b) authorizes a longshoreman whose injury is caused by the negligence of a vessel to bring a separate action against such a vessel as a third party. Thus, in the typical tripartite situation, the longshoreman is not only guaranteed the statutory compensation from his employer; he may also recover tort damages if he can prove negligence by the vessel. The second sentence of § 5(b) makes it clear that such a separate action is authorized against the vessel even when there is no independent stevedore and the longshoreman is employed directly by the vessel owner. That sentence provides, "if such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." If § 5(a) had been intended to bar all negligence suits against owner-employers, there would have been no need to put an additional sentence in § 5(b) barring suits against owner-employers for injuries caused by fellow servants.
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> 462 U.S. at ____, 103 S.Ct. at 2547.

The Court then concluded that § 5(b) of the Act does allow recovery of damages from an employer as owner of a vessel and remanded the matter to the court below for reconsideration of the manner in which the amount of the award had been calculated. The Supreme Court has made eminently clear that the law requires all harbor workers to be treated equally, whether their employer is an independent contractor or a vessel owner doing its own longshoring work.

The essential thrust of the Court's discussion in *Pfeifer* was that actions for negligence should be evaluated as if the plaintiff employee had been employed by an independent contractor. The Court pronounced its conclusion and holding regarding the plaintiff Pfeifer as follows:

> If respondent had been employed by an independent stevedore at the time of his injury, he would have had the right to maintain a tort action against the vessel. We hold today that he has the same right even though he was in fact employed by the vessel.
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> 462 U.S. at ____, 103 S.Ct. at 2548.

Considering Robertson's claim under the quoted standard leads to the unavoidable conclusion that he would *not* have been entitled to recover, *if he had been employed by an independent shipbuilder.* His employment relationship to Jeffboat cannot make the difference in whether or not he prevails in this suit. Since the evidence was insufficient to support a claim by an employee of an independent contractor, it is likewise insufficient to support Robertson's claim. Defendant, Jeffboat, has acknowledged from the outset of this action that the Act permits employee suits against employer vessel owners and has not sought to challenge liability on that basis. Nevertheless, the rationale underlying the *Pfeifer* decision applies with particular force to the facts and issues of this case. If a harbor worker should not be deprived of his rights under §5(b) simply because his employer and the vessel owner happen to be the same entity, logically the converse of such an analysis should also be true – i. e., the immunity from tort liability for a maritime employer in those instances where injury occurs as a result of negligence of persons engaged in ship building services should be equally applicable where the employer and vessel

owner are the same party. Such reasoning has been applied by several of the circuit courts.

The Second Circuit in *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789 (1979), considered a claim against an employer-owner which raised the question of the nature of the negligence which had caused the death of an employee providing repair services. That court held that a determination must be made whether the negligence was "owner occasioned" as distinguished from negligent acts of co-employees providing repair services.[5] The negligent employees in *Smith* were members of the crew of a tug operated by their employer, therefore recovery was allowed. The same reasoning was applied in *Richardson v. Norfolk Shipbuilding & Drydock Corp.*, 621 F.2d 633 (4th Cir. 1980). In that case the accident resulted from the negligent operation of a barge mounted crane by a co-employee engaged in repair work. Finding that the only work performed on the barge was repair work, the court denied recovery under §905(b) because the negligence of the crane operator was committed in his capacity as a repairman and, thus, was not negligence of the vessel owner.

The distinction between the ownership and service capacities of the employer mandated by the statute, as recognized by the Second Circuit in its *Smith* decision and the Fourth Circuit in its *Richardson* decision, also has been adopted by the Fifth Circuit. In *Cavalier v. T. Smith & Son, Inc.*, 668 F.2d 861 (5th Cir. 1982), the court held the plaintiff's suit to be barred by §5(b), because the negligence that caused his injury was attributable to the vessel's crew who were performing stevedoring services when the plaintiff was injured. In *Chiasson v. Rogers Terminal & Shipping Corp.*,

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5 604 F.2d 795.

679 F.2d 410 (5th Cir. 1982), the court again recognized the necessity of distinguishing between the dual capacities of an employer-vessel owner and affirmed the district court's granting of a summary judgment to the defendant on that basis.

These circuits have recognized that the Supreme Court and Congress have made clear their intent that all harbor workers be treated equally in determining their tort rights without regard to the presence or absence of an employment relationship to the vessel owner. The approach taken by the Sixth Circuit in deciding the appeal of Jeffboat violates this equal treatment principal by extending significant practical advantages to some harbor workers simply because they happen to be employed by the vessel owner. Employees of independent contractors would not enjoy that very genuine practical advantage. Thus, we would have the converse of *Pfeifer* causing prejudice to employees of independent contractors. Such a situation would be in conflict with the policy rationale behind treating all harbor workers equally.

In its prior opinion, the Sixth Circuit correctly observed that Jeffboat's liability must be based on some negligence as owner, rather than as employer, and that its actions in the two capacities must be kept distinct. But, the court then ascribed to the barge owner Jeffboat the same knowledge which employees of the barge builder Jeffboat had acquired in the course of their work. That made every member of the sandblasting crew on which Robertson worked an agent of the barge owner for the purpose of determining what knowledge was chargeable to the owner. That approach creates an inequity favoring an employee working on his employer's vessel over employees of independent contractors doing the same work and facing the same hazards. For the sake of illustration, if Robertson had been employed by an independent sandblasting company, which had proceeded with the work under the same circumstances – i. e., working with-

out lights and other safety devices required by federal statute and regulation — the knowledge of that fact by other employees of the independent contractor would not be attributed to the vessel owner and would not bear on alleged liability of Jeffboat as owner of the barge under construction.

The likelihood of unequal treatment is illustrated by the decision in *Hill v. Texaco, Inc.*, 674 F.2d 447 (5th Cir. 1982). Hill was employed by an independent contractor which went aboard the defendant Texaco's vessel to determine the effect of rust on the thickness of the walls in the cargo tanks on the vessel. Hill was injured while climbing around inside a tank without a safety belt or safety line. The Court found that a shipowner is not negligent under §5(b) simply because an unsafe condition is present at the commencement of ship repair operations, absent actual knowledge on the part of the shipowner that the repair contractor would not employ routine safeguards to avoid hazards to which his employees might be exposed.

Although the trial court had found that the vessel owner Texaco knew that Hill was not using safety equipment, the Court of Appeals reversed that finding as clearly erroneous and found that actual knowledge had not been proved. A judgment against Texaco was reversed, because the lack of knowledge defeated liability under the *Scindia* standard of care. Consider, however, that if Hill's crew had been employed directly by Texaco, and if Hill had been injured in exactly the same manner, using the approach taken by the Sixth Circuit would likely reverse the result of the case. All Hill would need to show was that some member of his crew knew that he was working without a safety line, and that knowledge would be attributed to Texaco as owner of the vessel and would lead to liability for having failed to intervene and enforce a safety regulation. For that matter, knowledge by

Hill himself probably would satisfy the Sixth Circuit's standard; it would be knowledge of an employee imputed to the employer as vessel owner. The prospect of a difference in results attributable solely to the presence or absence of an employment relationship is simply incompatible with the principle stressed by this court in *Pfeifer*.

The rationale of *Hill* was given further approval by the Fifth Circuit in *Duplantis v. Zigler Shipyard, Inc.*, 692 F.2d 372 (5th Cir. 1982). A barge had exploded during gas freeing operations at the independent contractor's shipyard. The Court found no duty on the part of a barge owner to intervene, because there was no evidence that the owner ever became aware of any defects which developed during the contractor's repair operation, and the vessel owner was entitled to rely on the expertise of the independent contractor in performing the operations which it had agreed to perform.

The inequality of the Sixth Circuit's imputed knowledge approach is magnified when combined with its interpretation of *Scindia Steam Navigation Co. v. de los Santos*, 451 U.S. 156 (1981), that knowledge of a hazard obliges the owner to intervene to remedy the hazard. In addition to charging Jeffboat as owner of the barge under construction with the knowledge of its employees engaged in building the barge, the Court of Appeals also read this court's decision in *Scindia* to hold that knowledge by an owner of a hazard in the independent contractor's operations necessarily gives rise to a duty on the part of the owner to intervene in that operation to remedy the hazard. But the decision in *Scindia Steam Navigation Co. v. de los Santos* stopped far short of setting a standard of care in terms expressed by the Sixth Circuit. *Scindia* does not hold that a vessel owner is obligated to intervene in stevedoring or similar activities in all instances where it has knowledge of a safety hazard.

Comparing this case to *Scindia* must start with recognition of significant factual distinctions affecting the duty imposed on the owner. In *Scindia* the injury was caused by a malfunction in the ship's gear which had existed when the stevedore commenced work.[6] This Court also noted that there was an inference at least that it was the owner's responsibility under OSHA and Coast Guard regulations to perform the repairs necessary to eliminate the malfunction.[7] This case did not involve any equipment of the barge under construction; rather, it arose from a failure of the shipbuilding crew to set up the temporary lights.[8] The applicable OSHA regulations placed this obligation on the employer in its shipbuilding capacity.

Under the facts in *Scindia*, this Court expressly rejected the Ninth Circuit's formulation of a duty to inspect and to supervise the stevedore activity as being too broad an interpretation of §5(b).[9] The holding of the Sixth Circuit here is, in all practical respects, a return to that overly broad standard. In short, the imputed knowledge amounts to a duty to discover the danger. If the vessel owner is going to be liable because his longshore employee had knowledge of a hazard which caused injury to a co-employee, the owner is compelled to inspect and to supervise the work or suffer

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6 Actually, the evidence on the point was in dispute. Since the district court had granted the owner a summary judgment, the plaintiff's version of the facts was assumed correct in deciding the legal issues. 451 U.S. at 156, 101 S.Ct. at 1618, 68 L.Ed.2d at 7.

7 451 U.S. at 175-178, 101 S.Ct. at 1626-27, 68 L.Ed. 2d at 18-19.

8 There is a single reference in the opinion of the Court of Appeals to guard rails. Although Plaintiff sought to establish liability on such a basis, the District Court did not find Jeffboat negligent in that respect.

9 451 U.S. at 168-170, 101 S.Ct. at 1622-24, 68 L.Ed. 2d at 13-15.

the consequences in tort liability, in addition to payment of compensation required by the Act.

The formulation of the standard of care set forth in the principal opinion in *Scindia* was that there are circumstances in which an owner has a duty to act where the hazard arises from the malfunctioning of the vessel's gear.[10] The particular circumstances which the Court pointed out were that the owner had actual or constructive knowledge of the malfunction and that there was an inference at least that it was the owner's responsibility in normal operations to repair its own equipment. Nothing in the principal opinion nor in either of the concurring opinions justifies the Court of Appeals' conclusion that knowledge of a hazard and foreseeably of harm obligates the owner to act. This interpretation also is in substantial conflict with the positions of the Fifth and Fourth Circuits.

In its recent decision in *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (1983), the Fifth Circuit spelled out the extent of a vessel owner's duty to harbor workers. The Court addressed the issue of whether liability of a vessel owner, with respect to dangers arising once stevedoring operations have begun, is less extensive under §5(b) of the Longshoremen's and Harbor Workers' Compensation Act, than under traditional tort rules. The court answered this inquiry affirmatively, holding that imposition of liability upon the vessel owner in the absence of actual knowledge is clearly foreclosed under *Scindia*. Further, it read *Scindia* as requiring both actual knowledge of a hazard and actual knowledge that the contractor-employer will not protect his employees from danger before the duty to intervene arises. Thus, the vessel owner is not required to discover the dangerous condition, nor to anticipate that the independent contractor will ignore it.

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10 451 U.S. at 176, 101 S.Ct. at 1626, 68 L.Ed. 2d at 17.

Petitioner submits that this concisely focused standard of liability i. e., actual knowledge of the condition and actual knowledge of the fact that the independent contractor will not remedy it – once stevedoring or other contracting obligations have begun constitutes the correct analysis of *Scindia*.

The Fifth Circuit has reiterated this position in the case of *Stass v. American Commercial Lines, Inc.*, No. 80-3704 (Dec. 9, 1983), wherein it announced that the defendant barge owner did not have a duty to supervise or inspect a shipyard's repair operations. Because the vessel owner did not have actual knowledge of the hazardous condition which arose, the court found it did not transgress *Scindia's* requirement that a vessel owner intervene when an unsafe condition is known and the stevedore or shipyard is improvidently failing to guard employees against it. Id. at 1029.

This interpretation of *Scindia* has also been followed by the Fourth Circuit in its recent decision of *Bonds v. Mortensen and Lange*, 717 F.2d 123 (4th Cir. 1983). The court found that *Scindia* ". . . made it clear that the shipowner may rely on the stevedore in the first instance to avoid exposing the longshoremen to unreasonable hazards". Id. at 126. It also recognized that the owner need not intervene to protect longshoremen unless the stevedore's judgment in carrying out his task is obviously improvident. Finding that the shipowner was not required to anticipate that the stevedore could not avoid the dangerous condition involved therein, the court concluded that the shipowner did not have a duty to intervene.

The application of *Scindia* by the Fourth and Fifth Circuits indicates that when the contractor begins its operations, a vessel owner has no duty to discover dangerous conditions

that develop during those operations. *Scindia* makes it clear that the obligation to provide a safe working environment is placed on the contractor as employer of the service crew pursuant to 33 U.S.C. §941. In order for the owner to have an obligation to intervene in the stevedoring, repair or building operations, he must have actual knowledge of the danger coupled with either a realization that the contractor cannot reasonably be expected to avoid the risk or actual knowledge that the contractor is proceeding improvidently disregarding the risk. The Sixth Circuit, on the other hand, has used imputed knowledge and an unqualified duty to intervene to impose liability on Petitioner Jeffboat in this case. Jeffboat would not have been liable on the facts of this case in either the Fourth or the Fifth Circuits, and that inconsistency should be reviewed under a writ of certiorari.

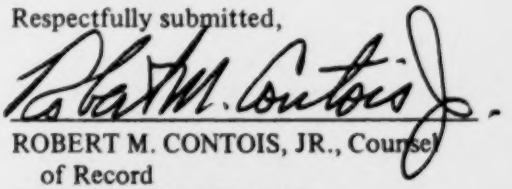
CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit in this matter violates the equal treatment rationale of the United States Supreme Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. _____, 103 S.Ct. 2541 (1983). If the errors of imputing knowledge and mandating an *ipso facto* duty to intervene are allowed to stand, a tremendously improved prospect for recovery will be granted to those vessel service employees who happen to be employed by the vessel owner. Such a result also nullifies the tort immunity provisions in §5 of the Act. Although the Act clearly specifies that an employer cannot be held liable for negligence of fellow servants engaged in contracted services, the vessel owner, in all instances, would be found liable for the same employees' mere knowledge of an unsafe condition.

The Sixth Circuit in this matter also confronts shipbuilders such as petitioner with substantial dual liabilities to employees engaged in new construction activity. So long as the

builder is the owner of the vessel under construction prior to delivery to the purchasing party, it stands exposed for general damages under tort liability for injuries sustained by employees engaged in the construction work, if the particular employee can show that his injury was caused in part by a hazard known to members of his construction crew, or, perhaps, known only to himself. It will not matter if the hazard is one which the employer as builder of the vessel is obligated by applicable safety regulations or industry custom to control; so long as he has the constructive knowledge imputed to him from the co-workers, he will be liable as owner for failing to intervene on the basis of that knowledge. At the same time, he will bear the substantial obligation to pay compensation benefits defined by the Act in question in all circumstances. The resulting dual liability cannot be reconciled with the Congressional intent expressed in the statute and the legislative history; it is in conflict with decisions of other circuits which have analyzed the question of the standard of liability of the owner-employer; and it is fundamentally at odds with the decision of this court in *Scindia Steam Navigation Co. v. de los Santos*, and *Jones and Laughlin Steel Corp. v. Pfeifer*. A writ of certiorari should issue to the Court of Appeals for the Sixth Circuit to review the issues raised by its decision.

Respectfully submitted,



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PETITIONER

IN THE
UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
Action No. C 76-0095-L (A)

PAUL ROBERTSON, Administrator of the Estate of
William L. Robertson

Plaintiff

v.

JEFFBOAT, INC.
1030 East Market
Jeffersonville, Indiana
and
Louisiana Barge Company (May be served at:)
c/o Louisiana Towing Company, Inc.
P.O. Box 4846, Greenville, Mississippi 38701
OR
c/o Louisiana Towing Corporation
2240 Peters Road, Harvey, Louisiana 70058
and
Unknown Defendants

Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
MEMORANDUM OPINION
Entered November 6, 1979

Plaintiff's decedent, William H. Robertson, known as Billy Robertson, was an employee of Jeffboat, Inc. on

February 27, 1975, where he was working on the bow of a metal "hopper" barge as part of a sand-blasting crew. The barge was owned by Jeffboat, Inc. While Billy was working with Arthur Lamb, who was approximately 100 feet from him, Billy disappeared from the barge and drowned. The drowning apparently occurred about 10:30 p.m. Billy was 27 years of age at the time of his death and was earning $5.27 per hour, plus a 15 cent differential when he died. He was not married and his only survivors are his parents and a brother.

No one actually saw Billy fall into the river, and the exact cause of his death is, therefore, unknown. Plaintiff introduced proof which indicated that the river was 8 to 10 feet above its normal pool, and that the current was faster than usual, and that there was debris in the river. The plaintiff also introduced evidence to show that the lighting conditions aboard the barges, and particularly the barge on which Billy was working, were unsatisfactory because of the height of the river. Some of this testimony was rather equivocal. It was established that there were no life rings on either end of the barge, no temporary lighting nor a temporary guardrail.

Billy and his fellow-employees were not wearing life jackets, although the employer introduced evidence to show that there were company rules requiring the wearing of life jackets. The company apparently took no steps to see to it that the rules were complied with in this respect.

The area where Billy was last seen was approximately 4½ to 5 feet wide. There were some cabals located on the barge about the middle of the bow of the barge in the area where Billy was last seen. Billy was pulling a hose which was used for sandblasting, and was walking backwards at the time when he was last seen.

Following Billy's death, there was a hearing held by the Benefits Review Board of the United States Department of Labor, which determined that the decedent's parents were not entitled to compensation benefits under the United States Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. Sec. 901, et seq. That determination was not appealed.

Decedent's parents spent $1,600 for his funeral and Jeffboat reimbursed them in the amount of $1,000. Plaintiff orginally brought suit under the Jones Act for negligence and under general Maritime Law for unseaworthiness. Jeffboat was granted summary judgment on these claims, but the plaintiff amended his complaint to allege a claim under 33 U.S.C. 905 (b).

Title 33 U.S.C. Sec. 905(b) represents a revision of 33 U.S.C. Sec. 905 which was enacted in 1927. The statute, taken in conjunction with 33 U.S.C. Sec. 905(a), has been held to provide the following rights and obligations:

1. A longshoreman or repairman who is injured on board a vessel may sue the vessel for negligence of the vessel;
2. The liability of the vessel to the longshoreman or repairman is to be determined by land-based principles and not maritime law;
3. The longshoreman's or repairman's employer is liable only for workman's compensation benefits which have been greatly increased;
4. The vessel is not to be charged with liability for the negligence of those engaged in private stevedoring services;
5. The vessel no longer has a nondelegable duty to provide a safe place to work.

See *Hurst v. Triad Shipping Company*, 554 F.2d 1237, 1241-43 (3rd Cir. 1977); *Gay v. Ocean Transp. & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977); *Napoli v. (Transpacific*

Carriers Corp. and Universal Carriers, Inc.) Helenic Lines, Ltd., 536 F.2d 505 (2nd Cir. 1976); *Griffith v. Wheeling Pittsburgh Steel Corporation*, 521 F.2d 31 (3rd Cir. 1975), cert. denied, 423 U.S. 1054 (1976).

The 1927 Act had provided that the liability of an employer was to be exclusive and in place of all other liability of the employer to the employee, 33 U.S.C. Sec. 905, now 33 U.S.C. Sec. 905(a); however, the Supreme Court scuttled this intent by its decisions in *Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) and *Seas Shipping Company v. Sieracki*, 328 U.S. 85 (1946), which held that the employee could sue the vessel for unseaworthiness and the vessel could then demand indemnity from the stevedore, thereby resulting in situations where stevedores not only paid compensation to the employee but also paid damages. This 1972 Act preserves the right of the worker to sue the vessel but limits his recovery to negligence created only by the vessel. The vessel is no longer liable under maritime principles, but may be liable under land-based principles. The stevedore receives his *quid pro quo* in that he is no longer liable for workman's compensation and damages, but only for the former.

Where the injured party is an employee of a party which is both the owners of the vessel and the furnisher of repair services, such as in the case here, the courts have held that the employer in its capacity as owner of the vessel, must be governed by Section 343A(1) of the Restatement of Torts 2d which reads as follows:

> "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, ***unless the possessor should anticipate the harm***

despite such knowledge or obviousness."
(Emphasis added).

This doctrine was adopted in *Napoli v. (Transpacific Carriers Corp. and Universal Cargo Carriers, Inc.) Helenic Lines, Ltd., supra,* and was approved in the case of *Lopez v. A/S/ D/S Svendborg,* and D/S of 1912 A/S, 581 F.2d 319 (2nd Cir. 1978).

In the absence of any Sixth Circuit decision in point since the passage of the 1972 Act, this Court will adopt the more modern trend of opinion embodied in Section 334A, *supra.*

It appears from the principles enunciated above, that Jeffboat, in its role as owner of the vessel, could not be held liable if the only negligence consisted of the failure of the lights on the land to illuminate the barges properly. This would be a failure of its duty as repairman. However, it seems to the Court that there is sufficient evidence of negligence on the part of the vessel, under the principles set out in section 343A to warrant recovery on the part of plaintiff. The owners of the vessel knew that plaintiff would be working at night on a high river on a relatively narrow walkway without making any provisions for lighting on board the barge and without furnishing any life rings or alarm bells.

The instant case is somewhat analogous to that of *Samuels v. Empresa Lineas Maritimas Argentinas,* 573 F. 2d 884 (5th Cir. 1978). There the plaintiff was injured when unloading cargo from a vessel. While unloading it, he slipped or stepped backwards into an empty space after getting a drink of water. The opening would have been open and obvious had the area been well-lighted. The ship was being unloaded at night and the injury occurred at night. Some lights had been placed by the stevedore. The testimony was equivocal as to how good the lighting was. There was testi-

mony that if the longshoremen had complained that the hole was too dark to work safely, the work would have been stopped. There was also evidence that the gang foreman complained to ship personnel that they had "pretty dim lights" and work was not stopped.

The court held that there was sufficient evidence for a jury to find that the vessel owner should have realized that there was an unreasonable risk of harm to a longshoreman, should have expect[ed] that the longshoreman would not discover or realize the danger, and failed to exercise reasonable care to make the condition safe or warn the longshoreman of it. See 573 F.2d at p. 886.

In the instant case, any negligence of the defendant with regard to the life jackets should properly be considered only as negligence of the employer, or stevedore, or repairman, rather than that of the vessel, but even so, and assuming that the bulk of the negligence which caused the decedent's death was that of the repairman rather than that of the defendant in its role as vessel owner, we believe that the vessel owner's negligence with regard to inadequate lighting and failure to supply life rings or alarm bells is sufficient to establish its concurrent negligence.

In the case of *Edmonds v. Compagnie Generale Transatlantique*, No. 78-479 decided June 27, 1979, the Supreme Court held that where a jury determined that the longshoreman had suffered total damages of $100,000 while unloading a vessel, and that he was responsible for 10% of the total negligence and that the stevedore's fault contributed 70%, and the shipowner was accountable for 20%, still the longshoreman was entitled to a total award of $90,000. The court held that Congress did not intend to modify the pre-existing rule that a longshoreman who was injured by the concurrent negligence of the stevedore and

the ship may recover for the entire amount of his injuries from the ship. See p. 9 of the slip opinion.

The principle is well settled that even in maritime injuries which have occurred since 1972, a plaintiff's contributory negligence is not a bar to his recovery of damages. See *Edmonds v. Compagnie Generale Transatlantique, supra,* and *Samuels v. Empresa Maritimas Argentinas, supra.*

In the instant case, plaintiff's decedent's failure to wear a life jacket, knowing of the company's rules and knowing of the hazards which he faced on the barge, leads the Court to attribute 50% of the cause of his death to his own negligence. Had there been no deduction on account of plaintiff's decedent's comparative negligence, the estate would have been entitled to recover $15,000 on behalf of decedent's mother and $15,000 on behalf of decedent's father for the loss of decedent's society.

Defendant contends that plaintiff is not entitled to recover any sum for loss of services or support provided by plaintiff's decedent to his parents. It is true that under the Longshoreman's Act, 33 U.S.C. Sec. 901, et seq., this same claim was made and denied by the appropriate administrative body and that no appeal was taken. However, in the case of *Hamilton v. Canal Barge Company, Inc.*, 395 F. Supp. 978 (E.D. La. 1975), former District Judge Alvin B. Rubin, now a Circuit Judge of the United States Court of Appeals for the Fifth Circuit, a judge who has rendered many excellent and definitive opinions in the field of maritime law, held that it is not proper to read a dependency requirement into the *Moragne v. State Marine Lines,* 398 U.S. 375 (1970) action for wrongful death. As Judge Rubin points out, neither the Jones Act nor the Death on the High Seas Act require dependency for a parent to recover. Therefore, he reasons that the same principles would apply to

the wrongful death action under the general maritime law.

Hamilton, supra, involved a case very much like the instant case in that plaintiff lived with his parents, assisted with household expenditures from time to time mowed the pasture, and took care of his younger brother, but did not pay rent. In the instant case, the evidence shows that plaintiff performed some services for his parents such as painting and working about the house. The Court concludes that $3,000 per parent would be a proper allowance for the services and support which plaintiff's decedent rendered his parents during his lifetime. See *Hamilton, supra.* Finally, the total award made to each parent of $18,000 must be reduced by 50% in order to reach the correct amount to be paid them.

Defendant's argument that plaintiff's decedent is barred from asserting a claim for support is without merit, inasmuch as the previous litigation involved the right of the parents as alleged dependents of the decedent. The Act under which they were proceeding required that they show dependency. Since Judge Rubin's opinion in *Hamilton, supra,* indicates that dependency is not required in the action for wrongful death, it, therefore, follows that issues reached in the administrative proceeding and the decision therein are not binding on this Court in this action.

In conclusion, we feel that an award of $18,000 reduced by 50% would be appropriate for each parent. Unreimbursed funeral expenses should be added to these amounts in the sum of $600. We observe that in *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 68 (1978), 98 S.Ct. 2010, the Supreme Court was not asked to pass upon what is designated as "large sums that the District Court would have awarded for loss of society." In that case the large sums were $50,000 for a surviving spouse and $20,000 for older

children of a deceased husband.

We have this day entered a final judgment in accordance with this opinion.

Dated 11-6-79

/s/ Charles M. Allen
Chief Judge

cc: Counsel of Record

JUDGMENT–Entered November 6, 1979

This action, having been tried to the Court without a jury, and the Court, having entered its findings of fact, conclusions of law and memorandum opinion and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that plaintiff, Paul Robertson, Administrator of the estate of William H. Robertson, recover from defendant, Jeffboat, Inc., the total sum of $18,600, said sums to be paid in equal amounts to the parents of William H. Robertson.

Plaintiff is also entitled to recover his costs herein expended.

This is a final and appealable judgment and there is no just cause for delay.

Dated 11-6-79

/s/ Charles M. Allen
Chief Judge

cc: Counsel of Record

No. 80-3136

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL ROBERTSON, Administrator of the
Estate of William L. Robertson,
Plaintiff-Appellee,

v.

JEFFBOAT, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Kentucky

Decided and Filed June 19, 1981

Before: WEICK and MERRITT, Circuit Judges; GILMORE, District Judge.*

MERRITT, Circuit Judge. Defendant, Jeffboat, Inc., a shipbuilder, appeals the district court's finding that its negligence contributed to the death of plaintiff's decedent, William Robertson. Jeffboat was Robertson's employer and the owner of a barge he was helping build at the time of his death. The court below based an award to Robertson's parents on 33 U.S.C. §905(b), a provision of the Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C.

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*The Honorable Horace W. Gilmore, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

§901 *et seq.* (LHWCA). We agree with the reasoning of District Judge Allen, and affirm the judgment below.

Robertson drowned after falling off a nearly-completed barge that he was sandblasting in preparation for painting. The accident occurred after dark, and no one saw or heard him fall into the water. Trying the case without a jury, the district court found that Jeffboat was negligent both in its capacity as employer and as vessel owner, but it is only liability in the latter capacity that is relevant here. It found that Jeffboat's provision of "inadequate lighting and failure to supply life rings or alarm bells is sufficient to establish its . . . negligence" as vessel owner. Applying a comparative negligence doctrine that reduced plaintiff's recovery by fifty percent, the court awarded $18,600 in damages.

Plaintiff based his claim against Jeffboat on 33 U.S.C. §905(b), which in pertinent part provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel. . . . If such person was employed by the vessel to provide ship building or repair services [as in this case], no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel [as distinguished from the negligence of the owner of the vessel in its capacity as owner]. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

The amendments to the LHWCA replaced the worker's former right to sue for injuries caused by the employer's negligence with an expanded unemployment compensation benefits program funded by the employer. Workers retained the right to sue vessel owners for injuries caused by the owner's negligence, even where the owner is also a shipbuilder employer of the injured workman. Those changes are reflected in §905(b). In this case Jeffboat is both owner and employer, but the statutory structure requires that negligence in the two capacities be distinguished. *See Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789, 795 (2d Cir. 1979).

The legislative history to the 1972 amendments makes clear that §905(b) incorporates land-based principles of liability. H.R.Rep.No. 92-1441, *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4703. The shipowner is not strictly liable for injuries suffered by longshoremen working on its ship. In *Scindia Steam Navigation Co. v. Santos*, 49 U.S.L.W. 4405 (April 21, 1981), a decision issued after oral argument in this case, the Supreme Court determined the principles applicable to suits by longshoremen against shipowners. The Court concluded that while "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop" after stevedoring operations have begun, 49 U.S.L.W. at 4410, it does owe a duty of care to workers for dangerous conditions of which it has actual knowledge. In the case, the Court affirmed the Court of Appeals' reversal of summary judgment granted to the shipowner against a longshoreman injured by a malfunctioning winch. It remanded the case, *inter alia*, for further inquiry into the factual question of whether the shipowner had actual knowledge of any defect in the winch that developed after the shipowner relinguished control to the stevedore.

In the instant case as well, liability turns on the shipowner's knowledge of dangerous working conditions, and on the foreseeability of the harm they might cause. As Jeffboat argues, its liability in this case must be based upon its negligence as owner rather than employer, and its actions in the two capacities must therefore be kept distinct. The question is whether the knowledge of defendant as shipbuilder that the employee would be working on the ship at night without adequate lighting or railings to protect him from falling is the kind of knowledge that can also be attributed to defendant as owner. Because Jeffboat *is* both owner and employer, any knowledge chargeable to it as employer must also be attributed to it as owner. What the employer knew, the owner knew. The district court was not clearly in error in concluding that Jeffboat should have anticipated the harm that inadequate lighting and the absence of safety measures might cause.

Accordingly, the judgment of the district court is affirmed.

ORDER DENYING PETITION FOR REHEARING
Filed September 20, 1981

Before: WEICK and MERRITT, Circuit Judges; GILMORE, District Judge.*

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

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*The Honorable Horace W. Gilmore, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

SUPREME COURT OF THE UNITED STATES
No. 81-935

Jeffboat, Inc.,

Petitioner,

v.

Paul Robertson, Administrator of the Estate of
William L. Robertson

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Jones & Laughlin Steel Corporation v. Pfeifer*, 462 U.S. _____ (1983).

IT IS FURTHER ORDERED that petitioner, Jeffboat, Inc., recover from Paul Robertson, Administrator of the Estate of William L. Robertson Two Hundred Dollars ($200.00) for its costs herein expended.

June 27, 1983

Clerk's costs: $200.00

No. 80-3136

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL ROBERTSON, ADMINISTRATOR
OF THE ESTATE OF WILLIAM L.
ROBERTSON,

Plaintiff-Appellee

v.

JEFFBOAT, INC.,

Defendant-Appellant

ORDER

Filed October 25, 1983

Before: MERRITT, Circuit Judge; WEICK, Senior Circuit Judge; and GILMORE, District Judge.*

In the above-entitled case the Supreme Court vacated our previous judgment remanding the case for reconsideration in light of *Jones & Laughlin Steel Corp. v. Pfeifer*, 103 S.Ct. 2541 (1983). We have read and reread the *Pfeifer* opinion by the Supreme Court. We are unable to see any conflict between the *Pfeifer* opinion and our previous opinion. In fact, the reasoning of the *Pfeifer* opinion and our reasoning on the liability issue in the case appears to be the same.

Being unable to find any conflict between the two

*The Honorable Horace W. Gilmore, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

opinions, we hereby order that our previous opinion and judgment be reinstated and that it become the final judgment of this Court in the case after reconsideration upon remand by the Supreme Court.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk